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No. 84-491

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

CHEVRON CHEMICAL COMPANY,
Petitioner,

v.

RICHARD LEANDER FEREBEE, JR., *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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REPLY BRIEF FOR PETITIONER

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In the petition for a writ of certiorari, Chevron Chemical Company demonstrated how the D.C. Circuit's decision in this case (a) circumvents Congress's express intention to preempt the field of pesticide labeling and to have the Environmental Protection Agency—and only that federal agency—decide all questions about pesticide labeling and (b) wreaks havoc with Congress's regulatory scheme by subjecting pesticide manufacturers to conflicting "regulation" based upon what a state lay jury may decide in any given case. Chevron also demonstrated how the D.C. Circuit disregarded established state law and

refused to certify its radical new theories to the Court of Appeals of Maryland for decision. Respondents' opposition only serves to highlight the need for immediate clarification by this Court of the critical issues raised in the petition.

1. Respondents studiously ignore the language of § 24(b) of the Federal Insecticide, Fungicide, and Rodenticide Act ("FIFRA"), 7 U.S.C. § 136v(b): no state shall "impose or continue in effect any requirements for labeling . . . in addition to or different from those required" by the Environmental Protection Agency ("EPA") under FIFRA. By allowing a state lay jury to second-guess EPA's expert determination, the D.C. Circuit's decision nullifies Congress's clear intention to have EPA, and EPA alone, use its scientific expertise to decide whether a pesticide is safe as labeled. It replaces the comprehensive regulatory plan of FIFRA with haphazard, conflicting state regulation through *ad hoc* jury verdicts.

The decision below leaves every pesticide manufacturer in the country with no legal guidance on what labels are required on the more than one billion pounds of pesticides produced annually in the United States to combat unwanted disease, insects, animals and vegetation.

More fundamentally, the D.C. Circuit's decision reflects a growing confusion among the lower courts as to when federal law or regulation preempts state tort remedies. This confusion arises from a misunderstanding of the Court's recent decision in *Silkwood v. Kerr-McGee Corp.*, —— U.S. —— (decided January 11, 1984). In *Silkwood*, the issue was whether the general nature of federal regulation of nuclear safety preempted a state tort suit for punitive damages. The legislative history made it clear Congress intended that state tort remedies would remain. Slip Opinion at 11-16. The Court expressly did not reach the issue of whether, without legislative history indicat-

ing that state tort remedies were to remain unaffected, comprehensive federal regulation would preclude a state law tort action. *Id.* at 11, 17. The lower courts, however, have begun to treat *Silkwood* as reopening the question of whether an explicit congressional preemption of state law encompasses preemption of state tort remedies.

In *Cippolone v. Liggett Group, Inc.*, 53 U.S.L.W. 2175 (D.N.J., decided September 20, 1984), for example, the court, following the D.C. Circuit's *Ferebee* decision, held that, notwithstanding very explicit statutory provisions and legislative history demonstrating that Congress intended to have a specific nationally-uniform warning—and no other warning—on cigarette packages, a plaintiff could nevertheless bring a state tort action based on a claim that the manufacturers should have used some other warning than the one required by Congress.

The *Ferebee* and *Cippolone* decisions represent a fundamental misinterpretation of this Court's preemption decisions. Like respondents, the lower courts now seem to demand from Congress an express statement that state tort remedies—not merely state law or regulation—are preempted. This is not the law. *See San Diego Unions v. Garmon*, 359 U.S. 236, 246-47 (1959). As the Court stated in *Pacific Gas and Electric Co. v. State Energy Resources Conservation & Development Commission*, —— U.S. ——, 103 S.Ct. 1713 (1983), when Congress occupies a field such as pesticide or cigarette labeling,

> the test of preemption is whether "the matter on which the state asserts the right to act is in any way regulated by the federal government."

103 S.Ct. at 1726, *quoting Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 236 (1947).

The legislative history of FIFRA establishes that § 24(b) was intended "to completely preempt State authority in regard to labeling and packaging." H.R. Rep. No. 92-511, 92d Cong., 2d Sess. 16 (September 25, 1971).

This case therefore offers an ideal opportunity to decide whether *Silkwood* was intended to reopen previously settled preemption issues.

The Court has recently recognized the lower courts' need for guidance on the issue of federal preemption of state tort remedies. It has granted a petition for a writ of certiorari in another case that raises the issue in a related context. *Allis-Chalmers Corp. v. Lueck*, No. 83-1748 (cert. granted, October 1, 1984). The present case offers an even better and more pressing opportunity to clarify the standards that govern in this area of the law.

2. Respondents misperceive the second issue presented in the petition. The Court of Appeals of Maryland has never addressed any of the three novel propositions articulated by the D.C. Circuit. Indeed, no court has ever held a manufacturer liable for mislabeling in a case where the plaintiff never bothered to read the label. In the very case respondents rely upon, *Levin v. Walter Kidde & Co.*, 251 Md. 560, 248 A.2d 151 (1968), the Maryland court affirmed a directed verdict for a defendant bottle manufacturer where the user admitted he did not follow the manufacturer's instructions. *Levin* underscores why, if a novel proposition of state law is going to be adopted, under *Lehman Brothers v. Schein*, 416 U.S. 386, 390-92 (1973), the Maryland Court of Appeals should make this decision.

Contrary to respondents' claim that there was a "question of fact as to whether Mr. Ferebee read the label," brief in opposition at 9 n.4, the evidence is undisputed, as both the district court expressly stated and the D.C. Circuit implicitly conceded. He never read the label. Petition at 16a, 45a; *see* Ferebee testimony, Record Entry No. 190-A at 195 (at 155) ("I never read the label on it because I didn't need to. . . .").

The point is that the D.C. Circuit's unfounded "prediction" that the Maryland Court of Appeals "would con-

strue" its tort laws so that it did not matter that the user failed to read the label ignored (a) the Maryland Court of Appeals' contrary language in *Phipps v. General Motors Corp.*, 278 Md. 337, 363 A.2d 955, 960 (1976), (b) the basic concept underlying pesticide labeling, and (c) the district court's own instructions to the jury that the label should "inform the ordinary *user* how to protect *himself* from [the] danger" (emphasis added).

If the holding in *Lehman Brothers v. Schein*—that certification is "particularly appropriate" where novel state law issues are involved—is to have any meaning, the Court should grant the petition to make clear the circumstances where a federal court should certify such issues to the proper state court. It is no answer, as respondents claim, that the issue is one of lower court "discretion"—the D.C. Circuit did not even offer any reason for its refusal to certify these controlling issues to the Maryland Court of Appeals.

For these reasons, and the grounds set forth in the petition, a writ of certiorari should issue to review the decision of the D.C. Circuit.

Respectfully submitted,

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